Pasupathy a/l Kanagasaby v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J–09–14 OF 1994
ABDUL MALEK AHMAD PCA, ARIFFIN ZAKARIA AND TENGKU BAHARUDIN JJCA
13 JANUARY 2005

Criminal Law — Cheating — Ingredients of offence — Whether person deceived must be person who suffered loss — No loss to bank who was deceived to make payment — Whether offence of cheating made out — Penal Code ss 34, 415 & 420

Criminal Procedure — Trial — Miscarriage of justice — Delay in supply of grounds of judgment — Whether amount to miscarriage of justice

Criminal Procedure — Trial — Close of prosecution's case — Test to be applied — Whether sufficient evidence to warrant conviction — Criminal Procedure Code s 422

Evidence — Accomplice — Corroboration — Whether must be corroborated in all aspects

Evidence — Corroboration — Prosecution witness — Whether witness for prosecution convicted in separate trial was co-accused — Evidence Act 1950 ss 17(2) & 30

Evidence — Witness — Witness pleaded guilty to related offence — Whether witness for prosecution convicted in separate trial was co-accused — Evidence Act 1950 ss 17(2) & 30

The accused ('the appellant') was charged in the sessions court for an offence under s 415 Penal Code ('PC') for abetting PW1 in cheating Malayan Banking Bhd ('MBB') to make payments based on an Employees Provident Fund ('EPF') warrant, deceiving the MBB that PW1 was the person named in the EPF warrant. He was found guilty and convicted and was sentenced to a term of three years' imprisonment and fined RM5,000 or five months' imprisonment in default. He failed in his appeal in the High Court against both conviction and sentence and hence appealed to the Court of Appeal.

The appellant's grounds of appeal were, among others: (1) delay of three years by the trial court in supplying the grounds of judgment of the sessions judge amounted to miscarriage of justice; (2) the deception that was practised on MBB's employee did not in fact occasion any loss to the bank or employee, therefore because the person so deceived did not suffer any loss, the offence of cheating was not proved; (3) the role of the appellant was not proven to constitute an offence under s 109 of the PC; (4) the sessions judge applied the wrong test at the close of the prosecution case; (5) PW1's testimony was a confession by a co-accused and that being so it could only be used to support other evidence and could not form the basis of the appellant's conviction; and (6) PW1 and PW14 who were accomplices were not credible witnesses, therefore must be

corroborated from independent sources inspiring confidence to connect the appellant in material aspects and on the axis of dispute. A

Held, dismissing the appeal against conviction and reducing imprisonment to two years:

(1) The appellant has not in any way been prejudiced nor shown to have been prejudiced by the delay in the supply of the grounds of judgment. In any event, this was not a ground that the court could consider as it was not one of the grounds raised in the petition of appeal nor had the appellant applied for or obtained leave of this court to rely on it (see para 11). B C

(2) Section 415 of the PC stipulates two classes of acts that may constitute the offence of cheating. As the cheating abetted was for dishonestly inducing MBB to deliver the money which falls under the class of acts referred to in the first part of s 415 of the PC and the charge being under s 420 of the PC, the question of who suffered the loss was totally irrelevant (see paras 14 and 19); *Gunasegaran s/o Pavadaisamy v PP* [1997] 3 SLR 969 followed. D

(3) 'Dishonestly' is defined in s 34 of the PC as the doing of anything with the intention of causing wrongful gain or loss to a party. In the context of s 415 of the PC, it merely qualifies the intention of the perpetrator. It must be distinguished from the resulting effect of the wrongful deed perpetrated which constitutes an element of the second part of s 415. On the facts of this case, there was no doubt that the appellant intended to cause wrongful gain when assisting PW1 to induce MBB to liquidate the EPF warrant by using a false identity card and he did indeed obtain wrongful gain when he took delivery of the money. By the same token, it was also intended by the inducement to cause wrongful loss to someone, be it the bank officer, MBB, EPF or the rightful EPF member. The offence was complete the moment the money was delivered, no matter who would have to bear the loss finally (see para 20). E F G

(4) The offence of cheating for which the appellant was said to have abetted was proven beyond reasonable doubt by the conviction of PW1 on her own plea. The only question here is whether the role played by the appellant as proven constituted an offence under s 109 of the PC. The evidence showed that the appellant did not only instigated and aided PW1 in committing the offence but in the words of the learned judicial commissioner 'he seems to be the *guiding light*behind the whole episode' (see para 21). H

(5) As for the test applicable at the close of the prosecution case, it had been held that s 422 of the CPC is in *pari materia* with the proviso to s60(1) of the Courts of Judicature Act 1964 and that in such a situation I

there would be no miscarriage or failure of justice if there is in fact sufficient evidence adduced to warrant a conviction. The facts of this case allow no room to doubt that there was overwhelming evidence adduced by the prosecution to substantiate the charge against the appellant. The sessions judge had made specific findings of fact which would have justified calling the appellant's defence even if she had applied the higher standard of proof (see para 22); *Ishak bin Hj Shaari v PP* [2003] 4 MLJ 585 followed.

(6) As for the appellant's objection of the court's treatment of the evidence of PW1 which he claimed to be the evidence of a co-accused, PW1 though an accomplice, was a witness for the prosecution and not a co-accused in this trial. Also, 'confession' for the purpose of s 30 of the Evidence Act 1950 ('EA') is defined in s 17(2) of the EA as, 'an admission made at any time by *a person accused of an offence* stating or suggesting the inference that he committed that offence'. PW1 was not a person accused of an offence in this trial. Therefore, her sworn testimony was not a statement of a co-accused and could not in the context of that section be termed as a confession (see para 24); *Herchun Singh v PP* [1969] 2 MLJ 209, *Dato Mokhtar bin Hashim & Anor v PP* [1983] 2 MLJ 232 and *PP v Nordin bin Johan & Anor* [1983] 2 MLJ 221 distinguished.

(7) The trial judge had properly evaluated the evidence of both PW1 and PW14 and found them not only reliable and credible but also sufficiently corroborated by independent evidence in material aspects to connect the appellant to the crime as well as to establish his prominent role in its commission. PW1's demeanour and her background convinced the sessions judge to believe she was telling the truth in narrating what actually happened. This was a finding of fact on credibility which an appellate court ought not to disturb. PW14 was also found to be sufficiently corroborated (see para 26).

(8) As there were strong corroborative material, direct and circumstantial, of PW1's evidence available to connect the appellant to the offence, the judicial commissioner was undoubtedly right in finding the evidence overwhelming and the case against the appellant established beyond reasonable doubt to justify the trial court calling for his defence to the charge (see para 31).

(9) There can be no doubt that only the conduct of PW14 prior to the offence charged was relevant in determining whether or not he was an accomplice. The sessions judge erred in law and fact in finding PW14 to be an accomplice. It follows that his evidence should enhance the prosecution case by not only corroborating PW1 about the trip to Johor Bahru but also by connecting the appellant with the offence by the possession of the incriminating exhs P28, P29 and P21A. However, even without the evidence of PW14 to corroborate PW1, there were

other sufficient evidence adduced by the prosecution against the appellant to justify the court calling for his defence (see para 33).

[**Bahasa Malaysia summary**

Tertuduh ('perayu') telah dituduh di mahkamah sesyen dengan kesalahan dibawah s 415 Kanun Keseksaan ('KK') kerana bersubahat dengan PW1 dalam memperdayakan Malayan Banking Berhad ('MBB') untuk membuat bayaran berdasarkan waran Kumpulan Wang Simpanan Pekerja ('KWSP'), dalam menipu MBB bahawa PW1 adalah orang yang dinamakan di dalam waran KWSP. Dia didapati bersalah dan dihukum penjara tiga tahun dan didenda RM5,000 atau lima bulan penjara jika ingkar. Beliau gagal dalam rayuannya di Mahkamah Tinggi ke atas kedua-dua sabitan dan hukuman, dan dengan itu telah membuat rayuan ke Mahkamah Rayuan.

Alasan-alasan rayuan perayu adalah, antara lain: (1) kelewatan tiga tahun oleh mahkamah bicara dalam memberikan alasan penghakiman oleh hakim sesyen merupakan suatu salah laksana keadilan; (2) perdayaan yang dilakukan ke atas pekerja MBB tidak pada hakikatnya mewujudkan apa-apa kerugian terhadap bank atau pekerja, maka oleh kerana pihak yang dikatakan diperdayakan tidak mengalami apa-apa kerugian, kesalahan penipuan tidak dibuktikan; (3) peranan perayu tidak terbukti untuk pembentukan suatu kesalahan di bawah s 109 KK; (4) hakim sesyen telah menggunakan penilaian yang salah pada akhir kes pendakwaan; (5) testimoni PW1 merupakan suatu pengakuan oleh tertuduh bersama dan dengan itu ia hanya boleh digunakan untuk menyokong keterangan lain dan tidak boleh membentuk alasan untuk sabitan perayu; dan (6) PW1 dan PW14 yang merupakan rakan sejenayah bukanlah saksi-saksi yang boleh dipercayai, maka dengan itu harus disokong daripada sumber-sumber yang bebas yang memberi kepercayaan untuk mengaitkan perayu di dalam aspek-aspek material dan paksi pertikaian.

Diputuskan, menolak rayuan ke atas sabitan dan mengurangkan hukuman penjara kepada dua tahun:

(1) Dalam mana-mana cara pun, perayu tidak diprejudiskan atau dilihat sebagai diprejudiskan dengan kelewatan pemberian alasan-alasan penghakiman. Walau apapun, ini bukanlah suatu alasan untuk mahkamah mempertimbangkan kerana ia bukanlah suatu alasan yang dibangkitkan dalam petisyen rayuan ataupun sesuatu yang dipohon oleh perayu atau telah mendapat kebenaran mahkamah untuk bergantung padanya (lihat perenggan 11).

(2) Seksyen 415 KK menyatakan dua kategori perbuatan yang merangkumi kesalahan menipu. Oleh sebab penipuan bersubahat adalah untuk mendorong MBB secara tidak jujur untuk memberikan wang yang

berada di bawah kategori perbuatan yang dirujuk di bawah bahagian pertama s 415 KK dan tuduhan tersebut dibuat di bawah s 420 KK, persoalan mengenai pihak mana yang telah mengalami kerugian tidak relevan sama sekali (lihat perenggan dan 14 dan 19); *Gunasegaran s/o Pavadaisamy v PP* [1997] 3 SLR 969 diikut.

(3) Perkataan "dishonestly" yang ditakrif di dalam s 34 KK sebagai melakukan sesuatu dengan niat untuk menyebabkan keuntungan atau kerugian yang salah kepada sesuatu pihak. Dalam konteks s 415 KK, ia hanya menyesuaikan niat penyalah guna. Ia harus dibezakan daripada kesan akhir perbuatan salah yang dilakukan yang merupakan satu elemen bahagian kedua s 415. Berpandukan fakta-fakta kes ini, tidak terdapat keraguan bahawa perayu berniat untuk mendapatkan keuntungan salah dengan membantu PW1 untuk mendorong MBB mencairkan waran KWSP dengan menggunakan kad pengenalan palsu dan dia sememangnya telah mendapatkan keuntungan salah bila dia mendapatkan wang berkenaan. Atas perkara yang sama, dorongan tersebut juga berniat untuk mendapatkan keuntungan salah kepada sesuatu pihak, sama ada ia adalah pegawai bank, MBB, KWSP atau ahli KWSP yang sebenarnya. Kesalahan itu disempurnakan pada ketika wang tersebut diserahkan, tanpa mengambil kira pihak mana yang akan mengalami kerugian pada akhirnya (lihat perenggan 20).

(4) Kesalahan menipu yang mana perayu dikatakan bersubahat telah dibuktikan tanpa keraguan yang munasabah melalui sabitan PW1 atas akuannya sendiri. Persoalan di sini hanyalah sama ada peranan yang dimainkan oleh perayu seperti yang terbukti merupakan suatu kesalahan di bawah s 109 KK. Keterangan menunjukkan bahawa perayu tidak hanya mendorong dan menolong PW1 dalam melakukan kesalahan tersebut, malah seperti yang diperkatakan oleh pesuruhjaya kehakiman, 'dia seolah-olah merupakan cahaya penerang untuk keseluruhan episod tersebut' (lihat perenggan 21).

(5) Berkenaan dengan penilaian yang terpakai pada akhir kes pendakwa, telah diputuskan bahawa s 422 KPJ adalah sama dengan proviso kepada s 60(1) Akta Mahkamah Kehakiman 1964 dan di dalam keadaan sebegitu tidak terdapat salah laku atau kegagalan keadilan sekiranya terdapat bukti yang mencukupi yang dimajukan untuk menyokong sesuatu sabitan. Fakta di dalam kes ini tidak membenarkan ruang untuk berasa sangsi bahawa terdapat bukti yang dimajukan oleh pendakwa untuk menyokong tuduhan terhadap perayu. Hakim sesyen telah mendapati fakta yang spesifik yang membenarkan pemanggilan pembelaan perayu walaupun beliau memakai beban bukti yang lebih tinggi (lihat perenggan 22); *Ishak bin Hj Shaari v PP* [2003] 4 MLJ 585 diikut.

(6) Berkenaan dengan bantahan perayu atas pemakluman keterangan PW1 oleh mahkamah yang mana dia mengadu sebagai keterangan tertuduh

bersama, PW1 walaupun seorang pensubahat, adalah seorang saksi untuk pendakwa dan bukannya tertuduh bersama di dalam perbicaraan ini. Tambahan pula, perkataan "confession" untuk tujuan s 30 Akta Keterangan ('AK') ditafsirkan di dalam s 17(2) AK sebagai, 'an admission made at any time by *a person accused of an offence* stating or suggesting the inference that he committed that offence.' PW1 bukanlah seorang yang dituduh atas suatu kesalahan di dalam perbicaraan ini. Maka dengan itu, testimoni bersumpahnya bukanlah satu keterangan oleh seorang tertuduh bersama dan tidak boleh dianggap sebagai pengakuan di dalam konteks seksyen tersebut (lihat perenggan 24); *Herchun Singh v PP* [1969] 2 MLJ 209, *Dato Mokhtar bin Hashim & Anor v PP* [1983] 2 MLJ 232 and *PP v Nordin bin Johan & Anor* [1983] 2 MLJ 221 dibeza.

(7) Hakim bicara telah meneliti keterangan PW1 dan PW14 dengan betul dan telah mendapati mereka sebagai bukan sahaja boleh diharap dan dipercayai tetapi juga telah disokong dengan keterangan yang berasingan di dalam aspek-aspek penting untuk mengaitkan perayu dengan kesalahan berserta dengan mengasaskan peranannya di dalam implementasinya. Perwatakan PW1 dan latar belakangnya telah mempengaruhi hakim sesyen untuk mempercayai bahawa dia berkata benar dalam memberitahu apa yang sebenarnya berlaku. Ini adalah penemuan fakta atas kredibiliti yang mana mahkamah rayuan tidak seharusnya mengganggu. PW14 juga didapati mempunyai sokongan yang secukupnya (lihat perenggan 26).

(8) Oleh sebab terdapat sokongan material yang kuat, secara langsung dan menyeluruh, tentang keterangan PW1 yang berupaya untuk mengaitkan perayu dengan kesalahan, pesuruhjaya kehakiman sememangnya betul dalam memutuskan kewujudan keterangan tersebut dan kes terhadap perayu diasaskan tanpa keraguan munasabah untuk membenarkan mahkamah bicara memerintahkan pemanggilan pembelaannya terhadap tuduhan tersebut (lihat perenggan 31).

(9) Tidak terdapat apa-apa keraguan bahawa hanya tingkah laku PW14 sebelum sabitan tuduhan dibuat adalah relevan dalam memutuskan sama ada dia merupakan pensubahat. Hakim sesyen khilaf di sisi undang-undang dan fakta dalam merumuskan PW14 sebagai pensubahat. Maka dengan ini keterangannya harus meneguhkan kes pendakwa bukan sahaja melalui menyokong PW1 mengenai perjalanannya ke Johor Baru tetapi juga dengan mengaitkan perayu dengan kesalahan melalui pemilikan eks P28, P29 dan P21A yang beramaran. Akan tetapi, walaupun dengan ketiadaan keterangan PW14 untuk menyokong PW1, terdapat keterangan lain yang mencukupi yang dimajukan oleh pihak pendakwa terhadap perayu untuk membenarkan mahkamah ini meminta pemanggilan pembelaannya (lihat perenggan 33).]

Notes

For cases on cheating, see 4 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 2129–2147

For cases on miscarriage of justice, see 5(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 4496–4497

For cases on close of prosecution's case see 5(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 4339–4348

For cases on corroboration of accomplice evidence, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 809–833

For cases on corroboration of evidence by the prosecution witness see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 924

For cases on witness pleading guilty to related offence see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) para 2674

Cases referred to

Arulpragasan a/l Sundaraju v PP [1997] 1 MLJ 1 (refd)
Baboo Khan v State [1961] 2 Cr LJ 759 (refd)
Chua Beow Huat v PP [1970] 2 MLJ 29 (refd)
Gunasegaran s/o Pavadaisamy v PP [1997] 3 SLR 969 (folld)
Harun bin Abdullah v PP [1998] 3 MLJ 1 (refd)
Herchun Singh v PP [1969] 2 MLJ 209 (distd)
Ishak bin Hj Shaari v PP [2003] 4 MLJ 585 (folld)
Khoo Kay Pin v PP [1964] MLJ 22 (refd)
Laxman Ramchandra Suryavanshi v State of Mysore [1962] 2 Cr LJ 559 (refd)
Mokhtar bin Hashim, Dato & Anor v PP [1983] 2 MLJ 232 (distd)
Munusamy v PP [1987] 1 MLJ 492 (refd)
PP v Nordin bin Johan & Anor [1983] 2 MLJ 221 (distd)
R v Baskerville [1916] 2 KB 658 (refd)
Ram Jas v State of UP [1971] 2 SCR 178 (refd)
Ratan Singh v Emperor [1935] Cr LJ 274 (refd)
Sundar Singh v Emperor [1905] 2 Cr LJ 75 (refd)
Yap Ee Kong v PP [(1981) 1 MLJ 144 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 53(2)
Criminal Procedure Code s 422
Evidence Act 1950 ss 17(2), 30
Penal Code ss 34, 415

Appeal from: High Court, Johor Bahru (Criminal Appeal No 42–7 of 1990)

Shahul Hameed Amirudin (Vijay Raj with him) (Zul Rafique & Partners) for the appellant
Anna Ng Fui Choo (AG's Chambers) for the prosecution.

Tengku Baharudin JCA (delivering judgment of the court):

[1] The appellant was charged in the sessions court Johor Bahru for an offence of abetting one Janakee d/o Sangaran Nair (PW1) in cheating Malayan Banking Bhd (MBB) on 22 April 1988 by dishonestly inducing its officer Mohamed Saat bin Jalil (PW9) to deliver to her RM21,076.05 against Employees Provident Fund (EPF) Warrant No 390692 (P2) by deceiving the said PW9 into believing that she (PW1) was Agnes d/o Valentine Selix Morris, the person named in the said EPF warrant P2 which money would not have been so delivered had PW9 not been so deceived. He was found guilty and convicted and was sentenced to a term of three years' imprisonment and fined RM5,000 or 5 months' imprisonment in default. He failed in his appeal in the High Court against both conviction and sentence and hence came before us. We heard his appeal on 5 October 2004 and this is our decision.

[2] The prosecution adduced its case through 23 witnesses and made available 15 others. The facts gathered from their testimonies are briefly as follows. Sometime in 1988 PW2, an EPF officer, discovered that there had been fraudulent withdrawals of monies standing to the credit of its allegedly deceased member one Lawrence Fernandez a/l AS Fernandez (PW5). His enquiries revealed that PW5 was in fact still alive. The second of two withdrawals was vide EPF warrant P2 which was sent to an address in Johor Bahru as specified in the application form (P11). He lodged a police report which initiated police investigations and culminated in the arrest of the appellant and PW1. PW1 who was charged for cheating in respect of the said second withdrawal of RM21,076.05 was convicted on her own plea of guilty and sentenced accordingly. She then became a witness against the appellant on the charge of abetting her in committing the said offence. The first withdrawal was made in the name of Ann Selvi w/o AS Fernandez purporting to be PW5's mother.

[3] It is the prosecution's case that the appellant had enlisted and secured the services of PW1, an illiterate single mother, through one Jeeva whom she knew for many years and also stayed not far from her house in Semenyih. Jeeva persuaded and brought PW1 to Kuala Lumpur to see the appellant who agreed to employ her as a domestic servant. On their way back, Jeeva had PW1's photograph taken at a photo shop allegedly for the said purpose. Subsequently, the appellant and Jeeva went to PW1's house and took her to a coffee shop where she was asked to affix her thumb print on certain documents in the appellant's presence.

[4] On 21 April 1988, the appellant and Jeeva again visited PW1. While the appellant remained in the car, Jeeva told PW1 to accompany them to her new job. PW1 packed her clothing and told her children that she would be back the next day. She joined Jeeva and the appellant in the car. Along the way, Jeeva alighted from the car and told PW1 to accompany the appellant to Johor Bahru, a place she had not been. The appellant then proceeded to the

airport where PW14 was waiting to take back the car. He was also asked to pick them up the next day on their return from Johor Bahru. PW1 then travelled by air with the appellant to Johor Bahru.

[5] PW15 who registered two rooms at Hotel Tropical Inn in Johor Bahru in the name of the appellant that evening at 9.02pm knew and recognised him as he was a regular guest there. She also recalled him making the room reservation by phone the same afternoon. PW1 did not however sleep in her hotel room that night as she was scared of being left alone in a strange place. She shared the same room with the appellant. Next morning, ie on 22 April 1988, PW1, who admitted to be a red identity card holder, was shown by the appellant a blue identity card with her photograph on it and he told her that the name on it was not hers. He took her by taxi to a post office where, using the said blue identity card, she collected a letter after affixing her thumb print before the postal clerk PW7. It was the same letter that the EPF sent to Agnes a/p Valentine Selix Morris containing the EPF warrant P2 which the postman PW6 could not deliver at the stated address. PW7 confirmed that the said letter was collected by an Indian woman who came together with a male Indian and who only agreed to affix her thumb print by way of acknowledgment of receipt (P16) of the letter after consulting her male companion.

[6] They returned to the hotel but later the appellant took PW1 to MBB in Johor Bahru and there caused her to affix her thumb print on the EPF warrant P2 and payment voucher (P18) at the bank counter before PW9 using the same identity card. It was the appellant who counted and collected the money in a briefcase while PW1 sat in the bank lobby watching. They then returned to the hotel before leaving later for the airport. The appellant was checked out of the hotel by PW16 who received cash payment for the two rooms from the appellant who also signed on the hotel bill (P37). They took a taxi to the airport and the appellant bought two MAS tickets (P31 & P32) for the flight to Kuala Lumpur in the names of K Pasu and C Saroja. Incidentally the appellant's ex-wife's name was Saroj short for Saroja or Sarojini and of course K Pasu can be short for the appellant's name K Pasupathy. PW1 and the appellant then boarded the 12.40 pm flight and was met on arrival by PW14 in the appellant's car. As PW14 did not know PW1's house and she could not guide him there, she was instead sent to Puduraya in Kuala Lumpur and the appellant gave her RM1,000.

[7] Sometime in August 1988, the appellant went with PW14 and two others to Telok Intan. At the instance of the appellant, PW14 rented a house from PW19 by paying a deposit of RM640 and representing that he was renting it on behalf of his aunt Mrs MK Menon. The appellant also gave PW1 RM50 to have a signboard with the legend 'MK Menon' made. PW14 collected the house keys the next day and ten days later, on the instruction of the appellant, PW14 again went to Telok Intan to place the signboard in front of the house.

[8] On 12 September 1988, PW14 visited the appellant's house. They later proceeded to Telok Intan at the appellant's instance carrying two briefcases (P33 and P34) and a typewriter (P23) which were taken by PW14 from the appellant's house on his instructions. PW14 drove the car as the appellant was tired having just come back from Hong Kong the day before. On arrival in Telok Intan PW1 bought two pillows, a post box and a bucket before going to the rented house. The appellant asked PW14 to tie the post box to the gate. They later went for dinner and came back very late. PW14 saw the appellant using P23 to type the estate duty form of MK Menon. The next morning the police who had been observing the house for a few days came to the said house and arrested both of them. Inside P33 were recovered, among other things:

(1) Two rubber stamps bearing words '*Pemungut Duti Harta Pesaka*' (Collector of Estate Duty) and '*Salinan yang sah Pen Pemungut Duti Harta Pesaka Tanah Melayu*' (certified copy of Asst Collector of Estate Duty) (P28 and P29);

(2) A horoscope chart (P33D) dated 11 June 1988 prepared by one NRamachandran Rao of Madras in the name of Mr Pasupathy;

(3) Copies of estate duty form 12 for the estate of Manikketh Karunakara Menon dated 8 August 1988, one typed and the other a carbon copy (P35 item 42 and P27A); and

(4) original estate duty form 12 for the estate of Lawrence Fernandez a/l AS Fernandez dated 21 January 1988 (P35 item 48 and P21A).

[9] PW12, the document examiner, confirmed that the stamp marks on the reverse side of estate duty certificates P27A and P21A were made from the rubber stamps P28 and P29. She also confirmed that P12, which was submitted together with P11 for the second withdrawal, was a photocopy of carbon copy of P21A with cancellation lines made separately. At the request of the police, she also compared the appellant's specimen handwriting contained in three sets of documents marked as P30(1), P30(2) and P30(3) with the writing on the reverse side of the payment voucher P18 and opined that they were written by the same person. Similarly the case with the handwriting at the bottom of P11 (Form EPF 30 submitted for the purpose of the second withdrawal). As for the horoscope chart P33D, the prosecution has the evidence of PW21 who went to Madras to see the said Ramachandran Rao who confirmed that he prepared P33D for a man who personally came to see him and gave his name as Mr Pasupathy. Mr Rao's affidavit was tendered as P51 exhibiting a slip of paper written with date, time and place of birth in the said Mr Pasupathy's own hand and his address and phone number as written by Mr Rao in his own records.

[10] Lawrence Fernandez a/l AS Fernandez (PW5) and his wife Agnes a/p Valentine Felix Morris (PW4) came forward to confirm that he was very

much alive and that P11 was not her application. Several particulars contained in P11 were said to be wrong including the spelling of her name. It was also shown that PW5's mother was not Ann Selvi w/o AS Fernandez as appearing in P9 in respect of the first withdrawal but Bela Fernandez d/o Paul Lopez (P15) or Mrs AS Fernandez and that she had in fact died in 1983. And finally PW20, a police finger print expert, confirmed that the right thumb print on the reverse side of the EPF warrant P2 and the left thumb print on the post office acknowledgment receipt P16 were the same as those of PW1 in the police record RJ2 (P50).

[11] The first complaint raised by the learned counsel for the appellant relates to the delay of three years by the trial court in supplying the grounds of judgment of the learned sessions court judge which he claimed had occasioned a miscarriage of justice. The same ground was argued on appeal in the High Court and was rejected by the learned judicial commissioner who held that, in the circumstances of this case, no miscarriage of justice had been caused. We have no reason to disagree with him. We also note that the appellant has not in any way been prejudiced nor shown to have been prejudiced by such delay. In any event, this is not a ground that we can consider as it is not one of the grounds raised in the petition of appeal nor had the appellant applied for or obtained leave of this court to rely on it: see s 53(2) of the Courts of Judicature Act 1964 (CJA).

[12] Learned counsel then submitted that there was a failure to establish a prima facie case on the charge against the appellant in that an ingredient of the charge was not proved and also that the wrong test was applied by the trial judge at the close of the prosecution case which defect cannot be cured by s422 of the Criminal Procedure Code (CPC). On the first point it was impressed upon us that the law applicable in this case is s 415 of the Penal Code (PC) before its amendment in 1999 and that to sustain the charge, one of the requisite ingredients required is that the person who was deceived must be the person who suffered the loss and not any other person. Therefore, a fundamental ingredient of the offence of abetment of cheating is alleged to be missing here as the deception practised on MBB's employee PW9 did not in fact occasion any loss to the said bank or employee as admitted by the prosecution witnesses. References were made to certain passages from *Ratanlal & Dhirajlal on Law of Crimes* (23rd Ed) at 1602, 1618, *Gour's The Penal Law of India* (10th Ed) (Vol IV) at 3636, and the cases of *Ratan Singh v Emperor* [1935] Cr LJ 274, *Sundar Singh v Emperor* [1905] 2 Cr LJ 75, *Khoo Kay Pin v PP* [1964] MLJ 22 and *Baboo Khan v State* [1961] 2 Cr LJ 759. It was contended that the judgment of the learned judicial commissioner who made a finding that in law MBB did suffer the loss is contrary to evidence.

[13] For ease of reference, s 415 of the PC in its pre-1999 amendment state reads as follows:

> 415Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to 'cheat' .
>
> *Explanation* — A dishonest concealment of facts is a deception within the meaning of this section.

and s 109 of the PC reads:

> 109Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.
>
> *Explanation* — An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment.'

[14] Reverting to learned counsel's first point, we totally agree with him that the pre-amendment s 415 of the PC applies in this case. We also agree that applying the same, the words 'that person' to suffer the harm or loss in that section must refer to the person who is deceived and not any other person. The cases he cited amply support that proposition. Beyond that, we find counsel's submission substantially flawed as s 415 of the PC stipulates two classes of acts that may constitute the offence of cheating, namely: (1) by fraudulently or dishonestly inducing the victim to deliver property; and (2) by intentionally inducing the victim to do or omit to do something which he would not do or omit. The cases cited clearly relate to those circumstances falling under the second category whereas the case at hand belongs to the first. In *Sundar Singh* and *Baboo Khan* the victims were not induced to deliver any property while the headnotes of the report for *Ratan Singh* reads: 'In order to bring a case within the *second part of s 415*…' and the charge in *Khoo Kay Pin* states: '*intentionally inducing* the said …' all of which being circumstances falling squarely under the second part of s 415 of the PC. A similar argument was raised in another case where the equipollent section of the Indian Penal Code was considered. In that case *Laxman Ramchandra Suryavanshi v State of Mysore* [1962] 2 Cr LJ 559, AR Somnath Iyer J held as follows:

> Section 415 consists of two parts. The first part refers to the offence of cheating committed by fraudulently or dishonestly obtaining delivery of any property from the person deceived ... Then occurs the second part which provides that if a person intentionally induced the deceived person to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, he cheats.

Now, the words 'which act or omission causes or is likely to cause damage property' occurring in the second part of s 415, have obviously no application to the first part of that section. Under the first part, the moment a person is deceived and by the practice of such deception a property is fraudulently or dishonestly obtained from him, or … the offence of cheating is committed.

[15] This view is reflected in the author's commentary on s 415 of the PC in *Ratanlal & Dhirajlal's Law of Crimes* (25th Ed) which also states the Code makers' view that: 'In the first class of cases the inducing must be fraudulent or dishonest. In the second class of acts the inducing must be intentional.'

[16] In *Ram Jas v State of UP* [1971] 2 SCR 178 at 181 the Supreme Court of India in setting aside the conviction for abetting the offence of cheating by personation states the ingredients required to constitute the offence of cheating under s 415 of the PC as follows:

(i) There should be fraudulent or dishonest inducement of a person by deceiving him;

(ii) (a) The person so deceived should be induced to deliver any property to any person, or to consent that any person shall retain any property; or

(b) The person so deceived should be intentionally induced to do or omit to do anything which he would not do or omit if he were not so deceived; and

(iii) *In cases covered by (ii)(b),* the act or omission should be one which causes or is likely to cause damage or harm to the person induced in body, mind, reputation or property.

which put paid to the appellant's argument on the issue.

[17] Learned counsel read to us a passage from *Gour's The Penal Law of India* (10th Ed) (Vol IV) at p 3636, which he also quoted to the learned judicial commissioner who adopted it in his judgment on the ingredients that constitute cheating. Granted that the ingredients listed for the offence therein are correct but the comments following it appear to have misled the learned judicial commissioner into agreeing with learned counsel's argument. Had he read on or been referred to p 3639, he would have seen *Ram Jas* and be saved the trouble of justifying his finding of loss suffered by MBB on delivery of property, or in this case money, being proven. On its true construction, s 415 stipulates that the offence is complete the moment money is delivered as a consequence of the deception.

[18] This view on the elements of the offence of cheating of the first category finds support across the causeway where their s 415 of the PC is also the same as our pre-1999 amendment section. The headnotes of the Singapore case *Gunasegaran s/o Pavadaisamy v PP* [1997] 3 SLR 969 reports as follows:

Held, dismissing the appeal and enhancing the sentence to 12 month: (1) For an offence of cheating under s 420 read with s 415 of the Penal Code to be made out,

three elements of the offence had to be stipulated. First, the victim had to be deceived. Secondly, there had to have been an inducement such that the victim delivered any property to any person. Finally there had to have been a dishonest or fraudulent intention on the part of the deceiving person to induce the victim to deliver the property. As to what constituted property, there was no dispute that money for the purpose of cheating amounted to property.

[19] That is a fair interpretation of the equivalent sections of our PC. Hence, in the case of the appellant, as the cheating abetted is for dishonestly inducing MBB to deliver the money which falls under the class of acts referred to in the first part of s 415 of the PC and the charge being under s 420 of the PC the question of who suffered the loss was totally irrelevant. We therefore find this contention of the appellant completely untenable.

[20] It is appreciated that 'dishonestly' is defined in s 34 of the PC as the doing of anything with the intention of causing wrongful gain to one person or wrongful loss to another. In the context of s 415 of the PC, it merely qualifies the intention of the perpetrator. It must be distinguished from the resulting effect of the wrongful deed perpetrated which constitutes an element of the second part of the section. On the facts of this case, there is no doubt that the appellant intended to cause wrongful gain when he took PW1 to Johor Bahru and not only did he instigate but he also assisted her to induce MBB to liquidate the EPF warrant P2 by using the false identity card and he did indeed obtain wrongful gain when he took delivery of the money. By the same token, it was also intended by the said inducement to cause wrongful loss to someone be it PW9, MBB, EPF or its member PW5. The offence was complete the moment the money was delivered, no matter who would have to bear the loss finally.

[21] Be that as it may, the offence of cheating for which the appellant is said to have abetted was proved beyond reasonable doubt by the conviction of PW1 on her own plea as recorded by the same sessions court judge a month earlier and confirmed by PW1 in her testimony. The only question here is whether the role played by the appellant as proven constituted an offence under s 109 of the PC. We agree with the concurrent finding of the lower courts that he not only instigated and aided PW1 in committing this offence but in the words of the learned judicial commissioner 'he seems to be the *guiding light* behind the whole episode'. We would even say that he was the mastermind of the operation.

[22] For the second point, it was submitted that the learned sessions court judge erred when applying the prima facie test in *Haw Tua Tau v PP* as adopted by the Federal Court in *Munusamy v PP* [1987] 1 MLJ 492 at the close of the case for the prosecution when she should have applied the maximum evaluation test in *PP v Chin Yoke* [1940] MLJ 47. It was contended that such misdirection had resulted in a miscarriage of justice and that s 422 of the CPC did not apply while the proviso to s 60 of the CJA did not warrant being

invoked. In support, learned counsel cited to us *Harun bin Abdullah v PP* [1998] 3 MLJ 1 and *Ishak bin Hj Shaari v PP* [2003] 4 MLJ 585. While it is apparent that a lower standard of proof was used in this case, it was the correct thing to do then as that was the prevailing and applicable law at the time of trial. It was the landmark decision of the Federal Court in *Arulpragasan a/l Sundaraju v PP* [1997] 1 MLJ 1 which totally changed the whole scenario and which not only caused the relevant law to be amended but also the consequent uncertainties as to the correct standard of proof to be applied at the close of the prosecution in cases decided earlier but still pending appeal. The present case is one of them. We are however now on firmer ground with the decision of a five-men bench of this court in *PP v Ishak bin Hj Shaari* which resolved the differences and set out the approach to be taken. It was held *inter alia* that the provision of s 422 of the CPC is in pari materia with the proviso to s 60(1) of the CJA and that in such a situation there would be no miscarriage or failure of justice if there is in fact sufficient evidence adduced to warrant a conviction. The facts of this case as narrated allow no room to doubt that there is overwhelming evidence adduced by the prosecution to substantiate the charge against the appellant. Perusing the grounds of decision of the learned sessions court judge, we find that she had made specific findings of fact which would have justified her to call the appellant's defence even if she had applied the higher standard of proof. We therefore see no merit on this point of appeal.

[23] The next ground of appeal is an attack on the treatment of the evidence of PW1. In evaluating PW1's evidence, the learned sessions court judge was alleged to have failed to appreciate the fact that PW1 was a co-accused and that by considering the evidence of PW1 and PW14 together as accomplices, she had misdirected herself in law which tantamounts to a miscarriage of justice. Learned counsel, in purporting to rely on the authorities of *Herchun Singh v PP* [1969] 2 MLJ 209, *Dato Mokhtar bin Hashim & Anor v PP* [1983] 2 MLJ 232 and *PP v Nordin bin Johan & Anor* [1983] 2 MLJ 221, contended that PW1's testimony was a confession by a co-accused and that being so it can only be used to support other evidence and cannot form the basis of the appellant's conviction.

[24] In *Herchun Singh*, the confession of a co-accused was adduced in support of the case against another co-accused and the Federal Court on affirming the conviction held that though s 30 of the Evidence Act 1950 (EA) permits the confession of a co-accused implicating another co-accused to be used against that other, such confession may only be called in aid of and to lend assurance to other positive evidence which evidence must be sufficient to sustain a conviction. In the joint trial of *Dato' Mokhtar bin Hashim* and *Nordin bin Johan*, the confession of a co-accused was also admitted and the learned trial judge, applying *Herchun Singh* among others, convicted the co-accused in the former and acquitted the respondents in the latter. However,

on the respective appeals to the Federal Court, the confession was rejected on account of its voluntariness being held to be questionable but the conviction of the co-accused in the former was affirmed as also the acquittal of the respondents in the latter. We have no quarrel with the principle therein enunciated but we find the facts of the instant case do not admit its application. Firstly, PW1 though an accomplice, is a witness for the prosecution and not a co-accused in this trial. Secondly, 'confession' for the purpose of s 30 of the EA is defined in s 17(2) of the EA as 'an admission made at any time by *a person accused of an offence* stating or suggesting the inference that he committed that offence'. PW1 is not a person accused of an offence in this trial. Her sworn testimony is therefore not a statement of a co-accused and cannot in the context of that section be termed as a confession. And thirdly, in the cited cases, what fell into consideration by the respective courts were the cautioned statements of the co-accused amounting to confession which were tendered in evidence and not their sworn testimonies implicating the other co-accused. In our view, therefore, the stand taken on behalf of the defence here is obviously misconceived. This ground accordingly fails.

[25] The next ground concerns the evidence of PW1 and PW14 as accomplices. It was submitted that there was a failure to consider if they were firstly credible witnesses and whether their evidence had the quality on which the court may act upon. It was contended that neither of them were credible witnesses. It was further submitted that their evidence must be corroborated from independent sources inspiring confidence to connect the appellant in material aspects and on the axis of dispute. It was then alleged that PW1's and PW14's evidence were uncorroborated on the axis of dispute and that the findings of the learned sessions court judge on corroboration when examined truly amounted to non-corroboration of the issues in dispute.

[26] In our view, the first complaint is totally unjustified. The learned judicial commissioner before whom the issue of credibility of PW1 and PW14 was also canvassed found no merit in the argument when he said in his judgment at pp 55-56 of the record of appeal that the learned sessions court judge appreciated the fact that PW1 and PW14 were accomplices whose evidence needed to be corroborated and that she had warned herself of the danger of acting on uncorroborated testimony of an accomplice. She also found PW1 to be a credible witness whose statement was consistent throughout. Perusing the grounds of decision of the learned sessions court judge, we note that contrary to learned counsel's contention, she did in fact state her appreciation of the danger associated with accomplice evidence and did apply the dual test of accomplice evidence. She took guidance from the principle expounded in *R v Baskerville* [1916] 2 KB 658 as formulated by the Federal Court in *Yap Ee Kong v PP* [(1981) 1 MLJ 144 in considering the nature and type of corroboration required. We have no doubt that she had properly evaluated the evidence of both PW1 and PW14 and found them not only reliable and credible but also

sufficiently corroborated by independent evidence in material aspects to connect the appellant to the crime as well as to establish his prominent role in its commission. It is significant to note that PW1's demeanour and her background seemed to have convinced the learned sessions court judge to believe she was telling the truth in narrating what actually happened. This is a finding of fact on credibility which an appellate court ought not to disturb. PW14 is also found to be sufficiently corroborated but we shall advert to his testimony in the later part of this judgment.

[27] Learned counsel enumerated a long list of what he considered to be the axis of dispute which required corroboration but allegedly not corroborated. It seems to cover every detail and aspect of PW1's testimony. With respect, if that be the law, the prosecution would not need the testimony of an accomplice at all as it would be redundant and superfluous. Lord Reading CJ in *R v Baskerville* defines corroborative evidence as follows:

> … corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused. The corroboration need not be direct evidence that the accused committed the offence, it is sufficient if it is merely circumstantial evidence of his connection with the crime.

[28] The kind of evidence required as corroboration is explained in *Yap Ee Kong* as 'some confirmation tending to connect the accused with the offence although it is not necessary that there should be independent confirmation of every material circumstances'. Such description clearly negates the learned counsel's expectation that every piece of testimony which might implicate the appellant to be corroborated by independent evidence. We do not think it wrong for the learned judicial commissioner to adopt Sharma J's statement in *Attan bin Abdul Gani v PP* [1970] 2 MLJ 143 as a fair summary of the law relating to corroborative evidence. He cited the first two rules stipulated therein which are as follows:

> (1) It is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of the complainant or accomplice, should in itself be sufficient to sustain conviction. All that is required is that there must be some additional evidence rendering it probable that the story of the accomplice (or complainant) is true and that it is reasonably safe to act upon it.
>
> (2) The independent evidence must not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the accomplice or complainant that the accused committed the crime.

[29] The same judge stated eight other rules on the point. In *Yap Ee Kong*, the Federal Court formulated basically the same rules but more concisely as quoted by the learned sessions court judge in her judgment. No doubt all the

authorities on point emphasize the requirement of additional evidence, be it direct or circumstantial, to confirm the accomplice's testimony connecting the accused to the crime. We would however agree with Sharma J that the nature and extent of evidence to be regarded as corroboration must necessarily vary with the circumstances of each case and also according to the circumstances of the offence charged. Justice must not be dispensed with blinkered eyes. If there is sufficient corroboration, the fact that the trial judge failed to deal with that aspect of the matter does not disentitle the appellate court from looking for and finding it in the evidence produced at the trial (see *Chua Beow Huat v PP* [1970] 2 MLJ 29 at p 35).

[30] The learned sessions court judge accepted PW1 as a credible and truthful witness whose evidence on the material aspects was consistent and firm. She found PW1 's evidence to have been independently corroborated by the testimonies of PW6, PW7, PW12, PW15, PW16 and PW20 as well as the evidence of PW1's fingerprints on the post office acknowledgment P16 and EPF warrant P2 and the bank's payment voucher P18 being in the appellant's handwriting. She also found PW1 mentally incapable of making the false applications P9 and P11 or preparing the false death certificate, marriage certificate and estate duty exemption certificate or the identity card pasted with her photograph to enable her to collect the EPF warrant P2 from the post office and cash it at MBB without the assistance of someone knowledgeable about the withdrawal procedures of EPF. She also found the falsification of these documents confirmed by PW2, PW3, PW4, PW5 and PW8 apart from PW7 and PW9 on the false identity card.

[31] The learned judicial commissioner on his part found, as he is entitled to do, further corroboration of PW1's evidence. He pointed to PW1's testimony that on arrival at the hotel in Johor Bahru she was accommodated in one of the rooms but spent the night in the same room with the appellant and found corroboration in PW15's evidence that the appellant had registered for two rooms and PW16's testimony that the appellant paid the bill for two rooms the following day. The appellant in fact made the reservation for the two rooms through PW15 on the afternoon on his arrival which fact should further support PW1's claim that the appellant was going to Johor Bahru with her that evening. The evidence of PW7 that she saw PW1 with an Indian man when asked to affix her fingerprint on P16 is said to also corroborate PW1's testimony that she had collected the registered letter containing the EPF warrant P2 from PW7 on the strength of the false identity card carrying her photograph which was handed to her by the appellant who was then also present. There can be no doubt that the identity card must be in the name of Agnes a/p Valentine Selix Morris (the appellant told PW1 it was not in her name) as the registered letter was addressed in that name and could not be delivered by PW6 at the given address which was also the same address used in the first withdrawal. The learned judicial commissioner also found PW9's

verification of the particulars on the identity card produced to him by PW1 to be similar to those contained in the EPF warrant P2 as an independent corroboration of PW1's story that it was the appellant who brought her to Johor Bahru to collect the letter from which the said warrant was retrieved by the appellant who then instructed her to cash it at MBB using the false identity card he handed to her. The fact that two MAS flight tickets (P31 and P32) from Johor Bahru were bought in the names which can pass as those of the appellant and his ex-wife could not be a coincidence as the arrival time of the said flight seem to conveniently be about the same time the appellant and PW1 also arrived at the airport in Kuala Lumpur when PW14 fetched them as instructed the previous day. With such strong corroborative material, direct and circumstantial, available to connect the appellant to the offence, the learned judicial commissioner was undoubtedly right in finding the evidence overwhelming and the case against the appellant established beyond reasonable doubt to justify the trial court calling for his defence to the charge.

[32] Let us now consider the role played by PW14 in so far as it concerns this charge faced by the appellant. The learned sessions court judge treated PW14 as an accomplice but accepted his evidence on the material points as convincing and independently corroborated by the evidence of PW12, PW17, PW18, PW19, PW21 and PW23. In his testimony, PW14 said he was with the appellant and PW1 on 21 April 1988 when the appellant told him that he was going to Johor Bahru with PW1 that evening and at the appellant's request the next day he fetched them from the airport and later sent PW1 to Puduraya. He then described his role in the Telok Intan transactions about four months later in August and September 1988 as narrated above. He was no doubt a friend of the appellant and they were together arrested by the police on 13September 1988 at the rented house in Telok Intan. While the finding in briefcase P33 of the horoscope chart P33D in the appellant's name (and containing personal particulars identical to his) together with the two estate duty rubber stamps (P28 and P29) and the estate duty certificate of Lawrence Fernandez (P21A) tends to connect him to this offence, what PW14 saw being typed by the appellant ties him to the other documents, ie the several EPF forms dated July, August and September 1988, the letters from Madam T Menon dated 29 August 1988 and 2 September 1988, the estate duty certificate Form 12 dated 8 August 1988 in the name of Manikketh Karunakara Menon (P57), the death certificate of Manikketh Karunakara Menon dated 25 April 1988 (P21B), the marriage certificate dated 8 July 1964 of Manikketh Karunakara Menon and Thankamani Narayanan Nair (P21C), and the identity cards of Thankamani a/p T Narayanan Nair and Victor Anthony a/l Sebastian also recovered therefrom. PW14's claim that both the briefcase and the typewriter belonged to the appellant is thus not uncorroborated. The question is whether all these evidence can justify the court to rule that PW14 was an accomplice in this trial. The learned sessions court judge did not state why she considered PW14 to be an accomplice although she did make a finding of fact that P33

belonged to the appellant. Neither did the learned judicial commissioner allude to it, but he found no error in the trial court's finding, which we agree, that P33 belonged to the appellant.

[33] The word 'accomplice' is defined in the *Oxford Dictionary of Law* (5th Ed) as 'One who is a party to a crime, either as a principal or as an accessory'. The *Cambridge Advanced Learner's Dictionary* (2003) describes him as 'A person who helps someone else to commit a crime or to do something normally wrong' . Lord Simonds LC in *Davies v DPP* [1954] 1 All ER 507; [1954] 2 WLR 343 states the question to ask in determining whether a person is an accomplice as: *'Is there any evidence upon which the trial judge could properly rule that X was a participant in the offence?* As the appellant is charged for the offence of abetment, the observation of Hepworth J in *Varatharajalu v PP* [1960] MLJ 158 at 160 should also be a helpful guide. It is this: *'The offence of abetment corresponds as nearly as one word can be said to correspond to another to the offence which is known in England of being an "accessory before the fact". It has no reference to "accessories after the fact"'*. This is borne by and reflects the explanation to s 109 of the PC quoted earlier in this judgment and also the illustrations following thereafter. Applying the above meaning and observation to answer the question, there can be no doubt that only the conduct of PW14 prior to the offence charged is relevant in determining whether or not he was an accomplice. The mere fact that PW14 met the appellant with PW1 on 21 April 1988 and was told by the appellant that he was taking PW1 to Johor Bahru clearly falls short of implicating him with the offence that the appellant and PW1 subsequently committed there. The fact that he fetched them from the airport the next day and the events that occurred in Telok Intan four and a half months later can in no way have contributed to its commission. In the event, we are of the view that the sessions court judge erred in law and fact in finding PW14 to be an accomplice. It follows that his evidence should enhance the prosecution case by not only corroborating PW1 about the trip to Johor Bahru but also by connecting the appellant with the offence by the possession of the incriminating exhibits P28, P29 and P21A. However, even without the evidence of PW14 to corroborate PW1, there is as shown earlier sufficient other evidence adduced by the prosecution against the appellant to justify the court calling for his defence.

[34] The only other ground that needs mention is in respect of the evidence of PW12 which was alleged by learned counsel to have been accepted *in toto* by the learned sessions court judge thereby abdicating her function as decider of fact. This argument has also been canvassed at the first appellate level and rejected. Suffice to say that we associate ourselves with the view taken by the learned judicial commissioner and the conclusion arrived at, which is repeated hereunder:

> Counsel argued that the session court judge had abdicated her function by allowing PW12 to determine the question. With respect I do not think that that was the position. From my reading, PW12 had given her opinion and had placed upon the

court all the data on which she bases her opinion. The value of such evidence has been determined by the session court judge. Furthermore the issue is not whether exhibit P11 was a forgery but whether the handwriting found in that document was that of the appellant. There is clear evidence that PW4 never made the application to withdraw her husband's EPF funds. PW12's opinion, when accepted by the court, is only of corroborative value. Even if this court agrees with the argument of counsel and disregard or discard the session court judge's finding with regard to the handwriting in exhibit P11, we still cannot run away from the fact that the appellant had abetted PW1 in cheating the bank of its property. That is the crux of the matter and in this respect the evidence against the appellant remains overwhelming.

[35] Hence this ground must also fail.

[36] Finally, in the light of such a strong and incontrovertible case for the prosecution, we would agree with the concurrent findings of the courts below that the defence was an outright denial and nothing more. Having denied that he went to Johor Bahru with PW1 on 21 April 1988 the appellant resiled under cross-examination conceding that he might have been there and booked two rooms at the hotel but could not remember with whom he had stayed. He even denied ever knowing PW1 claiming that he only saw her for the first time when they were both charged in court. But the cumulative effect of all the evidence admits no other conclusion but the guilt of the appellant. We are satisfied that the defence had been carefully evaluated and the credibility of witnesses on both sides duly assessed. We find the trial court justified in finding that the defence failed to raise a reasonable doubt on the prosecution case. The affirmation of such finding and sustainment of the ensuing conviction were therefore absolutely correct and must be upheld.

[37] For the reasons stated we find no merit in the appellant's appeal against conviction which must be and is hereby dismissed.

[38] As regard the sentence imposed by the sessions court which was confirmed by the High Court on appeal, we are minded not to interfere in view of the facts and other relevant matters considered by both the lower courts. It has however been brought to our attention now that the charge has been hanging over the appellant's head for the last 16 years. He was apparently first charged in court on 4 October 1988 (see the charge sheet). Although he was convicted and sentenced on 30 May 1990, his appeal in the High Court took another four years and the process of appeal in this court took a further ten years, the delay being attributed to some deficiencies in the court below. The appellant now 61 years old is a widower for the last four years and has a 16 year-old school-going daughter to support. He has been deprived of his law practice due to the conviction. He had also spent two weeks in prison pending appeal to this court before bail was allowed. Having considered all these circumstances in particular the mental anguish and loss of fruitful years caused by the long delay through no fault of the appellant as against the seriousness of the offence and the paramount public interest that has to be

protected, we feel that justice would be better served if the custodial sentence be shortened. We accordingly reduce the said sentence of imprisonment from three years to two years. The fine imposed is confirmed.

Appeal dismissed..

Reported by Loo Lai Mee